In the United States Court of Federal Claims

No. 00-352 C

(Filed: June 20, 2001)

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SOUTHGULF, INC.,	*	
	*	**Motion for Summary Judgment;**
Plaintiff,	*	**Judgment Upon the**
	*	**Administrative Record;**
v.	*	**Bid Protest;**
	*	**Standard of Review;**
THE UNITED STATES,	*	**Past Performance Rating;**
	*	**and Agency Discretion.**
Defendant.	*	
	*	
* *	*	

Laurence L. Zielke, Louisville, Kentucky, for plaintiff.

Deborah P. Samuel, Washington, D.C., Department of Justice - Civil Division, for defendant, with whom were ***Deputy Assistant Attorney General Stuart Schiffer***, ***Director David M. Cohen, Assistant Director Harold D. Lester, Jr.,*** and ***Of Counsel Paul J. Coelus, Air Force Legal Services Agency***.

ORDER

TIDWELL, *Senior Judge*:

In this government contract case, plaintiff, SouthGulf, Inc., alleges that it was wrongfully denied two contract awards for various painting projects at two United States military installations. SouthGulf now seeks a declaratory judgment and damages resulting from the delay and litigation costs. The matter is currently before the court on defendant's motion for judgment

upon the administrative record and SouthGulf's motion for summary judgment. For the reasons stated below, the court hereby ALLOWS defendant's motion for judgment upon the administrative record and DENIES SouthGulf's motion for summary judgment.

BACKGROUND

I. Facts

A. The Hurlburt AFB Solicitation

On January 4, 2000, defendant, acting through the United States Air Force, issued Solicitation No. F08620-00-R0003 for the application of protective coating (paint) to various exterior and interior areas around the Hurlburt Field Air Force Base in Florida. The Solicitation required bidders to identify references for work performed in the last three years (a maximum of 15 references), and information on all federal contracts performed (a maximum of last 10 consecutive contracts). *See* Administrative Record (AR) at 39. In evaluating the past and current performance criteria of bidders, the Best Value technique chosen for this acquisition was the Performance Price Tradeoff (PPT), in which past performance and technical acceptability were deemed *significantly more important* than price or cost. *See* AR at 40. Bidders were to identify past and current contracts for efforts similar to the government requirements in this solicitation. *See* AR at 40-41.

SouthGulf bid $596,750, and was awarded a Best Value rating of *significant confidence*. *See* AR at 255-66, 286. On March 29, 2000, SouthGulf was notified that it's bid was unsuccessful. *See* AR at 292. SouthGulf was also informed that the contract was awarded to Ostrom Painting & Sandblasting, Inc. "Ostrom"), the lowest bidder, for $575,090. *See id.* The successful bidder had a Best Value rating of *High Confidence*. A *high confidence* rating was deemed superior to that of a *significant confidence* rating under the terms of the Solicitation. See

AR at 286.

B. The Eglin AFB Solicitation

On March 06, 2000 defendant issued Solicitation No. F08651-00-R0017 for exterior painting services at Eglin Air Force Base in Florida. The Solicitation required bidders to provide references for work performed in the last three years, and information on a maximum of five contracts performed in the past. *See* AR at 355. In evaluating past and current performance criteria of bidders, the Best Value technique chosen for this acquisition was the PPT where past performance was *deemed equally* important with price. *See* AR at 356. The bidders were to submit information about past and current contracts for efforts similar to the government requirements in the Solicitation. *See* AR at 356.

SouthGulf bid $2,959,950. *See* AR at 505. On May 1, 2000, the Government assigned a Best Value rating of *Very Good*. *See* AR at 751. EVCO National, Inc. was the second lowest bidder to the Solicitation. EVCO was awarded the contract for $2,983,550 after receiving a rating of *Exceptional*. The contract was awarded on May 2, 2000. *See* AR at 886.

On May 5, 2000, SouthGulf protested the award to the Contracting Officer, complaining that is was unfair for SouthGulf to be awarded an *Exceptional* rating for past performance on the Hurlburt contract, but only a *Very Good* rating for the Eglin contract. The Contracting Officer reported that one of SouthGulf's past performance questionnaires had not been returned, but that SouthGulf had not been given an *Exceptional* ratings by any reference. *See* AR at 887-88.

II. Procedural Background

SouthGulf filed a complaint and petition for preliminary injunctive relief in this court on June 21, 2000, protesting both contract awards. On July 6, 2000, the court flatly denied the petition after finding that SouthGulf had failed absolutely to show there would be a substantial

threat of irreparable injury in the absence of the injunction. This should have been the end of the matter.

Defendant filed a motion for judgment upon the administrative record on February 7, 2001, and SouthGulf filed a motion for summary judgment on April 17, 2001.

A. Hurlburt AFB

SouthGulf claims that Ostrom's bid should have been deemed void because it was patently unbalanced and substantially below the cost of performance. Because SouthGulf received the same past performance rating as the successful bidder, and was the second lowest in price, plaintiff asserts that Ostrom's bid should have been rejected and award made to SouthGulf.

B. The Eglin AFB Solicitation

SouthGulf claimed that it received a past performance rating not on the list of possible ratings in the Solicitation, and the Government arbitrarily excluded some of its past performance evaluations. *See* AR at 356-57.

SouthGulf claimed that its bid was rejected even though its bid was lower and it had received a past performance rating comparable to that of the successful bidder. Specifically, SouthGulf complained that the Government arbitrarily excluded one of SouthGulf's references without consulting or notifying SouthGulf, and failed to contact another of SouthGulf's references until after the contract had been awarded. After filing its bid protest, the Government had attempted to contact a fifth reference. Of the remaining four contacts, one did not reply until after award. SouthGulf claims that the Government breached an implied-in-fact duty to assure all of the references identified by SouthGulf actually responded to the questionnaire.

ARGUMENT

I. Standard of Review

Motions for judgment based upon the administrative record are reviewed under the same standards as motions for summary judgment. Rule 56.1(a) of the Rules of the Court of Federal Claims (RCFC); *see also Richey v. United States*, 44 Fed. Cl. 577, 581 (1999). Such motions are appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When both parties enter dispositive motions bearing a summary judgment standard, each party bears its own burden to demonstrate the lack of genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In meeting this high standard, the court infers all evidence in the light most favorable to the nonmovant. *See Anderson v. Liberty Lobby*, 477 U.S. at 255.

The standard of review applicable to bid protests is the same standard applied to agency decisions pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706. 28 U.S.C. § 1491; *see also SDS Int'l v. United States*, 48 Fed. Cl. 759, 766 (2001); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997). Section 706(2)(A) of the APA provides, in pertinent part, that a reviewing court shall set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under this standard, the court may not substitute its judgment for that of the agency. *Cubic*, 37 Fed. Cl. at 342; *RADVA Corp. v. United States*, 17 Cl. Ct. 812, 818-19 (1989). "The court may set aside an agency's procurement action only when there is no rational basis for the agency's decision." *See Keco Indus., Inc. v. United States*, 203 Ct. Cl. 566, 579 (1974) holding that a court is permitted to set aside the agency's action only when the decision is found to be "totally lacking in reason."

In fact, a material issue of fact evidencing a decision of such irrational behavior would almost always certainly support an allegation of bad faith. *Keco*, 203 Ct. Cl. at 575.

In the case at bar, SouthGulf must show a "significant, prejudicial error [existed] in the procurement process." *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (*citations omitted*). For SouthGulf to establish a prejudicial error it must also prove "that there was a substantial chance it would have received the contract award but for that error." *Alfa Laval*, 175 F.3d at 1367 (*citations omitted*).

II. The Hurlburt AFB Solicitation

SouthGulf claims that it actually had submitted the low bid because Ostrom's bid was allegedly unbalanced and should have been rejected. It is true that a bid must be rejected if the bid is materially unbalanced. *J & D Maint. and Serv. v. United States*, 45 Fed. Cl. 532, 537-38 (1999). A bid is materially unbalanced when the terms of performance or overall cost pose an unacceptable risk to the government. *Anderson Columbia Envtl., Inc. v. United States*, 43 Fed. Cl. 693, 699 (1999).

The first query in this review is to determine if the bid was mathematically unbalanced; i.e., a bid based upon prices that are significantly less than cost for some work and prices that are significantly overstated in relation to cost for other work. *Anderson Columbia Envtl.*, 43 Fed. Cl. at 700. This does not close the matter, however, because an agency may award a contract based upon a bid that is mathematically unbalanced if it does not lead to unacceptable risk to the government. *Anderson Consulting v. United States*, 959 F.2d 929, 933 (Fed. Cir. 1992); *Gracon Corp. v. United States*, 6 Cl. Ct. 497, 498 (1984).

> A materially unbalanced bid is one "based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and ... there is a

> reasonable doubt that the bid will result in the lowest overall cost." Id. In requirements contract solicitations, a mathematically unbalanced bid contains high prices for some line items and low prices for others. However, the unbalancing is not material unless the solicitation's estimates are inaccurate, "since the unbalanced bid will only become less advantageous than it appears if the Government ultimately requires a greater quantity of the overpriced items and/or a lesser quantity of the underpriced items." Duramed Homecare, B-245766, Jan. 30, 1992, 92-1 CPD ¶ 193, 196.

See Anderson Columbia Envtl., 43 Fed. Cl. At 699.

SouthGulf simply alleged in its complaint that EVCO's bid was frontloaded and, therefore, should have been rejected by the Air Force. Although not argued in its motion for summary judgment it was clear that the thrust of SouthGulf's argument was that EVCO's base year bid was higher than its option year bids. This fact alone does not disqualify a bidder's eligibility from the Solicitation. A bid may be determined to be materially unbalanced only if it is "so unbalanced as to be tantamount to allowing an advance payment." FAR 15.814. If this type of unbalancing occurs, the bid is *grossly front-loaded* and may be rejected by the government. The court refers to the matter of *J & D Maint. & Serv's*, where the plaintiff in that case made a similar allegation. *J & D Maint. & Serv's. v. United States*, 45 Fed. Cl. 532, 539 (1999). The court in that case stated the following:

> J & D next argues that Ashe's bid required advance payments on indefinite quantity line items as a condition of acceptance. That is, that Ashe would receive advance payments for indefinite quantity items before such items were performed. Bids that truly require advance payments are to be rejected. 48 C.F.R. § 32.405(b); Riverport Indus., Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd B-18656.2 (1985), 85-2 CPD ¶ 108; Barnard- Slurry Walls, 97-1 CPD ¶ 23 (Low bid properly rejected as materially unbalanced where lump sum price for preparatory work line item was many multiples higher than reasonable value of work, such that bid was grossly front-loaded, and unit price for work was

significantly less than government estimate and other bid prices).

J & D Maint. & Serv's. v. United States, 45 Fed. Cl. 532, 539 (1999) (*citing Barnard-Slurry Walls*, 1997 U.S. Comp. Gen. LEXIS 15).

SouthGulf argues that Ostrom's unbalanced bid will prevent the government from realizing savings under the Ostrom contract if the government chooses not to exercise the remaining option years. Ostrom's base year bid was $261,492.50 and its total price was $575,090.00; SouthGulf's base year bid was $241,325.00 and its total price $596,750.00. SouthGulf contends simply that the government would have to pay Ostrom a greater amount in the base year than it would to SouthGulf, and may not ever realize any savings. Because of the closeness of bids and the lack of evidence however, the court finds that SouthGulf failed to show how Ostrom's base year estimate was overstated.

The Federal Circuit has held that the determination of whether a bid is materially unbalanced is "something that is best known by the agency, for it is dependant on projected ordering patterns, and we therefore give broad discretion to contracting officers in deciding whether material imbalance is present or not in a proposal." *SMS Data Prod. Group, Inc. v. United States*, 900 F.2d 1553, 1557 (Fed. Cir. 1990) (*quoting SMS Data*, 89-1 BCA ¶ 21,567, at 108,615). Furthermore, the government adopted these principles in the Hurlburt Solicitation by embracing FAR § 52.215-1, which was incorporated by reference. *See* AR at 13, 34. The Solicitation states that "the Government may determine that a proposal is unacceptable if the prices proposed are materially unbalanced between line items or subline items . . . A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government." *See* id at 34. *See also Doe v. United States*, 46 Fed. Cl.

399, 401-02 (2000) (which found that "the use of 'may' expressly places the determination . . . within the agency's discretion") (*quoting Evans v. United States,* 14 Cl. Ct. 194, 197 (1988).

Based upon the above discussion, the court holds that Ostrom's bid was not materially unbalanced and the government properly awarded the Hurlbult contract using a reasonable decision making process.

III. The Eglin AFB Solicitation

SouthGulf claims that it was unfairly denied the Eglin award even though it submitted the lowest bid and its past performance of *Very Good* was comparable to that of the successful bidder's *Exceptional* rating. More specifically, SouthGulf claims that the Government's exclusion of some past performance evaluations was arbitrary because there were no stated protocal for addressing instances when bidders submit a greater number of references then permitted by the Solicitation. Had all of its references been contacted, SouthGulf claims it would have received a higher rating. SouthGulf also asserts that it was given a rating inconsistent with the ratings allowed by the Solicitation.

The government determined that EVCO's *Exceptional* past performance rating, when compared to SouthGulf's *Very Good* rating, "far exceeds the minor price difference" between the proposals. AR at 751. The price difference between these two bidders was $23,600, or 0.8 percent. The Contracting Officer found that EVCO provided the "best overall value to satisfy the Air Force requirement." *Id.*

SouthGulf claims that it was prejudiced by the Contracting Officer because it received a rating not found in the Solicitation. Although true, the court finds that SouthGulf was in no way prejudiced by this action. The Eglin Solicitation contained the following past performance ratings: *Exceptional/high confidence; satisfactory/confidence; neutral/unknown confidence;*

marginal/little confidence' and *unsatisfactory/no confidence*. *See* AR at 356-57. As a result of a "computer glitch," the past performance evaluation forms used by the Government to record the references contained an additional category of "*Very Good*," whereas the "*Very Good"* rating was missing in the Solicitation. *See* AR at 564-747. The court finds that this mistake was not a harmful error to SouthGulf's detriment, given the circumstances as a whole.

In order for SouthGulf to prevail, it must show that there was a significant error in the procurement process and it was prejudiced by the error. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996). To establish prejudice, SouthGulf must prove "there was a substantial chance it would have received the contract award but for that error." *Alfa Laval*, 175 F.3d at 1367 (*citation omitted*); *Overstreet Elec. Co., Inc. v. United States*, 47 Fed. Cl. 728, 731-32 (2000). The court finds that there is no factual evidence to support the probability that SouthGulf would have received a rating better than *Very Good* but for this error. SouthGulf needed an *Exceptional* rating even to tie EVCO's past performance rating. SouthGulf was not prejudiced because the Government was unaware of the error at the time bids were evaluated and treated all bidders equally. All bidders had an equal opportunity to receive a *Very Good* rating based upon responses to the government's PTT questionnaire.

SouthGulf's contention that, had there been no *Very Good* rating then SouthGulf would have received an *Exceptional* rating, is unfounded and beyond reasonable belief. Prior to the submission of final ratings, Gary A. Williams, the Chief of the Clearance & Policy Division, Contracting Directorate, elevated SouthGulf's pre-rating of *Satisfactory* to *Very Good*. Mr. Williams stated that SouthGulf's original rating of *Satisfactory* from the Air Force evaluation team was not adequately supported in light of the relative number of *Very Good* and *Satisfactory* answers on SouthGulf's performance questionnaires. This does not prove by any stretch of the

imagination that SouthGulf would have been rated *Excellent* had Mr. Williams not believed he could change the rating to a *Very Good*. Of the three references which were timely received, none reported an *Exceptional* rating. SouthGulf received a *Very Good* rating on 36 of the 51 questions. The contention that SouthGulf would have received an *Exceptional* rating is wishful thinking at best and not based upon facts of record.

SouthGulf also alleges that defendant failed to transmit evaluation questionnaires to all references identified by SouthGulf. As we have seen, the Eglin Solicitation directed bidders to identify five references to be sent questionnaires and did not specifically state what would occur if bidders identified more than the allowable limit of references. SouthGulf claims the government arbitrarily excluded one reference because the Government only sent out five questionnaires without consulting with SouthGulf, presumably to permit SouthGulf to choose which five should have been sent.

When asked about the procedure for instances when bidders proffer more than the allowable number of references, the Contracting Officer stated that their standard practice is to "take the first five off the top." AR at 887-88. The contract specialist, Mr. Driscoll, stated that he used the maximum number of references permitted by the Solicitation, in the order in which they appeared in the offeror's proposal. The Court finds this practice clearly not to be arbitrary, but a logical, standard procedure that is not an abuse of discretion by the Contracting Officer. SouthGulf's argument that the government acted arbitrarily by relying on only three references identified by SouthGulf is also without merit. Only three of SouthGulf's five identified references replied by the April 14, 2000 deadline and thus, were the only references considered in determining SouthGulf's Best Value rating. The Government stated that it made several attempts to contact the two unresponsive references, but received no reply.

The Air Force determined that EVCO's bid posed a minimal risk to the government, noting that it had "accepted EVCO's pricing structure as part of their pricing strategy" due to its past experience with Eglin. AR at 888, 893. This determination, combined with EVCO's *Exceptional* past performance rating, led the Air Force to a decision to accept EVCO's offer. The court is satisfied that this decision was a reasonable one, fully supported by the administrative record.

The court finds that defendant did not arbitrarily or capriciously act in such a way that would have unfairly denied SouthGulf the contracts at issue in the case at bar.

CONCLUSION

For these reasons, the court hereby ALLOWS defendant's motion for judgment upon the administrative record and DENIES SouthGulf's motion for summary judgment.

The Clerk is directed to enter judgment accordingly. Costs to the United States.

IT IS SO ORDERED.